No. 653

In the Supreme Court of the United States

OCTOBER TERM, 1960

GENERAL SHOE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court wrote no opinion. Its findings of fact and conclusions of law (R. 53a-62a) are not officially reported. The opinion of the Court of Appeals (Pet. 13-22) is reported at 282 F. 2d 9.

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1960. (Pet. 22.) A petition for rehearing was denied on December 1, 1960. (Pet.

23.) The petition for certiorari was filed on January 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In 1951 and 1952, the taxpayer transferred real property to its Employees Retirement Trust created to carry out its Employees Retirement Plan. The question presented is whether the taxpayer realized taxable income, subject to capital gain treatment, in the amount of the difference between the basis and the fair market value of the properties transferred.

STATUTES INVOLVED

The pertinent statutes, Sections 22(a), 22(f), 111(a) and 111(b) of the Internal Revenue Code of 1939, are set out in the Appendix, *infra*, pp. 8-9.

STATEMENT

The relevant facts are not in dispute, and may be summarized as follows:

The taxpayer is a Tennessee corporation, with its principal office and place of business in Nashville. Its business consists of the manufacture and sale of shoes. (R. 6a.) In 1945, it established an Employees Retirement Plan and created an Employees Retirement Trust to implement the plan. (R. 23a-36a, 53a.) In the following years, there were modifications and amendments of the plan (R. 36a-40a), but its general outline remained the same.

Under the plan, contributions are made only by the employer, and benefits are provided for employees who retire at a specified retirement age after specified minimum periods of service. The benefits are designed to supplement social security benefits, and the amounts paid are based upon the period of service of the employee, his average compensation during his last ten years of service, and the amount of his social security benefits. (R. 53a-54a.)

It was the intention of the taxpayer to make contributions to the trust, so that the trust could in turn pay benefits to retired employees, as provided in the plan, but the District Court found that it was never the intention of the taxpayer to assume any legal obligation to make contributions to the trust, and that the taxpayer had expressly reserved the right to discontinue contributions at any time. (R. 55a-56a.)

In 1945, the taxpayer's actuary estimated the total requirements of the plan for allocation to future payments at $1,220,000, of which $1,130,000 was based on prior service, and $90,000, based on current service. (R. 44a.)

In its fiscal years 1951 and 1952, the taxpayer transferred real property to the trust. On October 29, 1951, the taxpayer transferred to the trust land with a factory building located at Lawrenceville, Georgia, and land with a factory building on Caroline Street in Atlanta, Georgia. (R. 56a.) The basis to the taxpayer of these two properties was $113,923.15 (R. 6a), and their fair market value was $410,000 (R. 6a, 56a). In the taxable year ending October 31, 1952, the taxpayer transferred to the trust land and

a building located on Yonge Street in Atlanta, with a fair market value of $37,500, and land and factory buildings at Huntsville, Alabama, with a fair market value of $600,000. (R. 58a.) The basis of these two properties was $54,831.58. (R. 6a.)

In its tax returns for these years, the taxpayer claimed, and was allowed an expense deduction of, the fair market value of these properties, but a capital gains tax was assessed, measured by the difference between fair market value and basis. The taxpayer paid the taxes, and thereupon filed this action. (R. 53a.)

The District Court entered judgment for the taxpayer. The Court of Appeals reversed.

ARGUMENT

The petition for certiorari presents no direct conflict with the decisions of any other court of appeals or of this Court; the only other decision of a court of appeals on this factual situation is in agreement with the decision below; and the case raises no question of general importance. Review by this Court is, therefore, not warranted.

1. The taxpayer's transfer of real estate to the retirement trust, though made under no legal obligation, constituted a disposition of property, equal to its fair market value, for purposes of providing more compensation for deserving employees in consideration for services rendered and not merely of satisfying the taxpayer's desire to become a benefactor. As the court below points out (Pet. App. 19-20), the tax-

payer received an economic benefit and hence a realized taxable gain measured by the difference between the basis and fair market value of the real estate. Thus, the present case is clearly distinguishable from *Campbell* v. *Prothro*, 209 F.2d 331 (C.A. 5th), where no economic benefit was held to be involved with respect to a gift of appreciated property, and is in accord with the closely related decision in *International Freighting Corp.* v. *Commissioner*, 135 F.2d 310 (C.A. 2d). In *International Freighting*, a corporation voluntarily, and under no legal obligation, paid bonuses to its employees in stock which had appreciated in value in its hands. It was held to have realized gain and to have received income based on that appreciation in value. As the court there stated (*id.* at 313): "It was not a gift precisely because it was 'compensation for services actually rendered,' i.e., because the taxpayer received a full quid pro quo."

Furthermore, despite the taxpayer's argument (Pet. 6) that the amount needed to fund the plan may be unascertainable, the value of the economic benefit "is clearly capable of being evaluated on an objective basis" (Pet. 20), and therefore Sections 22(f) and 111(a) and (b), App., *infra*, pp. 8-9, may easily be applied (see Pet. 21). The pension plan was based upon actuarial tables and tied to actuarial computations. (See R. 44a.) When the taxpayer was considering amending the plan in 1950, a detailed computation of costs was submitted to it. (R. 49a.) By the transfer of the properties, the pending requirements of the trust, an actuarially com-

puted amount, were met in part, and to that extent satisfied to a precisely calculated sum, and the balance which the taxpayer planned to pay was reduced accordingly.

2. The petition suggests (pp. 3-4) that the decision below is in conflict with the Sixth Circuit's own recent decision in *Commissioner* v. *Marshman*, 279 F. 2d 27, certiorari denied, 364 U.S. 918. The court of appeals itself distinguished *Marshman* on the basis that emotional factors there involved prevented objective valuation of the gain (Pet. 21), and on reconsideration of the present case it adhered to its distinction in the denial of the petition for rehearing (Pet. 23).

Moreover, even if there were an indirect conflict between that case and the present one, it would be solely a conflict within a circuit—which this Court does not sit to resolve (see *Wisniewski* v. *United States*, 353 U.S. 901)—and the present decision would be supported by the decisions of other circuits involving the *Marshman* factual situation (*Commissioner* v. *Mesta*, 123 F. 2d 986 (C. A. 3d); *Commissioner* v. *Halliwell*, 131 F. 2d 642 (C. A. 2d); see *Kenan* v. *Commissioner*, 114 F. 2d 217 (C. A. 2d)).[1]

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[1] Similarly, *Helvering* v. *Walbridge*, 70 F. 2d 683 (C. A. 2d), deals with an entirely different factual situation and therefore does not reflect the view of the Second Circuit on the precise question here involved. The Second Circuit's view was expressed in its subsequent decision in *International Freight Corp.* v. *Commissioner*, *supra*. An entirely different factual situation was also involved in *General Utilities Co.* v. *Helvering*, 296 U. S. 200.

3. Finally, the petition for certiorari (pp. 5-7) repeats the argument, presented to the court of appeals in the taxpayer's petition for a rehearing, that the case was decided on theories not presented to it or to the district court. Even if the taxpayer's contention were correct, there would not necessarily be error. See *Hormel* v. *Helvering*, 312 U. S. 552; *Commissioner* v. *Hopkinson*, 126 F. 2d 406, 409 (C. A. 2d). The reasoning of the court of appeals, however, does reflect arguments made to it and to the district court, and the taxpayer had full opportunity in its briefs and petition for rehearing to answer these arguments, and did so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 1961.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [as amended by Secs. 1 and 3, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(f) *Determination of Gain or Loss.*—In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in section 111.

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

Sec. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property

shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * *

(26 U.S.C. 1952 ed., Sec. 111.)

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SUPPLEMENTAL BRIEF FOR PETITIONER

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MAY IT PLEASE THE COURT:

Petitioner files this supplemental brief in support of its petition for certiorari for the sole purpose of calling the Court's attention to the decision of the United States Court of Claims in *Thomas Crawley Davis and Grace Ethel Davis v. The United States*, No. 516–58, decided March 1, 1961. The question there involved was the same as that involved in *Commissioner v. Mesta*, 123 F. 2d 986 (1941), cert. denied 316 U. S. 695 (1942); *Commissioner v. Halliwell*, 131 F. 2d 642 (1942), cert. denied 319 U. S. 741; and *Commissioner v. Marshman*, 279 F. 2d 27 (1960), cert. denied ____ U. S ____.

The Court of Claims rejected the *Mesta-Halliwell* principle and followed *Marshman*, saying:

> ". . . We think as did the court in *Marshman*, *supra*, that the measurement of gain cannot be the fair market value of the property transferred. We

also believe, as did the court in *Marshman*, that the measure of the value of the wife's right to maintenance and support was dependent upon so many uncertain factors that neither the taxpayer nor a revenue officer could do more than guess at it."

And with respect to the "economic gain" argument, the Court said:

"If the 'property' received by Davis had no fair market value, or if none has been shown, it may be economic gain but it is not taxable gain by reason of the express provision of section 1001(b). *Champlin v. Commissioner*, 71 F. 2d 23, 29."[1]

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[1] Section 1001(b), Internal Revenue Code of 1954, contains exactly the same language as Section 111(b), Internal Revenue Code of 1939.